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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-636

FRANK W. COKER and REGINA COKER

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank W. and Regina Coker, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 14, 1973.

Opinions Below

The findings of fact and opinion of the Tax Court (Appendix A, *infra*, pp. 9-15) are reported at 31 T.C.M. 317. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 16-18) is reported at 480 F.2d 146, 31 AFTR 2d 73-1323.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1973. The time for filing this petition for a writ of certiorari has been extended by Order of Mr. Justice Thurgood Marshall to and including October 11, 1973 (Appendix C, *infra*, p. 19). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether, from all the dollars earned and received by petitioner Frank W. Coker in carrying on his trade or business, all expenses paid or incurred by petitioner in driving between his residence and job site and in driving at the job site are deductible under Section 162(a) of the Internal Revenue Code, without constitutionally valid statutory proscription, in order to reduce petitioner's *gross receipts* down to what may be taxed as petitioner's *income* under the Internal Revenue Code and the Sixteenth Amendment to the Constitution of the United States.

Statutes Involved

INTERNAL REVENUE CODE OF 1954

Section 162. TRADE OR BUSINESS EXPENSES.

(a) In General. — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business

Section 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

CONSTITUTION OF THE UNITED STATES

16th AMENDMENT. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Statement of the Case

During the year 1966, Frank W. Coker ("Frank") was the carpenter shop steward at a construction site in Stony Brook, New York, which site covered two large tracts (eight to ten miles apart) where between 500 and 600 single family dwellings were constructed in 1966.

Frank's duties included: blowing the whistle to start and stop work; deciding when weather was unfit to work in; checking carpenter's union cards; keeping time records; procuring union cards where necessary from the district council office; keeping records of each carpenter's time for his welfare, pension and vacation benefits; checking the union's time records against the contractor's records; taking injured carpenters to the hospital; insuring that contractors observed the terms of the union contract; and doing carpentry work as time permitted, thus necessitating the presence of his carpentry tools at all times. In connection with his duties, Frank was required to transport in his 1964 Oldsmobile approximately 200 pounds of tools a total of 16,182 miles in 1966 to and from the job site daily in the same 1964 Oldsmobile required for performing his duties on the job site. In the course of performing his duties, Frank contacted at least once and sometimes two or three times each day more than 80 carpenters employed at this job site. To reach these men spread over two large tracts, Frank was required to travel at least 60 miles per day on the job site and vicinity in the same 1964 Oldsmobile containing the 200 pounds of tools, driving an additional total of 15,660 miles in 1966 in connection with his duties.

Every one of the 31,842 miles driven by Frank in his 1964 Oldsmobile was a business necessity to enable Frank to perform the services required to earn and acquire dollars in his trade or business. Of this total mileage, the Tax Court allowed as ordinary and necessary trade or business expenses under Section 162(a) of the Internal Revenue

Code all of Frank's expenses of driving 15,660 miles on the job site. Of the remaining required 16,182 miles, the Tax Court held one-third of the expenses of these required 16,182 miles to be deductible as ordinary and necessary trade or business expenses under Section 162(a) of the Internal Revenue Code and the remaining two-thirds of the expenses of these required 16,182 miles to be personal, non-deductible, commuting expenses under Section 262 of the Internal Revenue Code.

Petitioner's total expense of driving to, on and from the job site was $2,678.94. The Tax Court allowed as a deduction $1,923.78 or 71.811239% of the $2,678.94 total.

The Commissioner and petitioners appealed the Tax Court's decision. The Court of Appeals for the Second Circuit affirmed the Tax Court, thus leaving the Commissioner and the petitioners with no resolution of the dispute over the deductibility of Frank Coker's business expenses.

Upon order and permission of the Second Circuit, the Commissioner and petitioners filed *out-of-time* petitions for rehearing of the Second Circuit's affirmance of the Tax Court decision. As of the early part of October 1973, the Second Circuit has made no ruling on either of the *out-of-time* petitions for rehearing and the Commissioner and petitioners still have no resolution of the dispute over the deductibility of Frank Coker's business expenses.

By an Order signed by Mr. Justice Thurgood Marshall on July 31, 1973 (Appendix C, *infra*, p. 19), the time for filing this petition for a writ of certiorari was extended to and including October 11, 1973.

Reasons for Granting the Writ

1. Both the Commissioner and the petitioners appealed the Tax Court decision herein and are in agreement that the Tax Court decision in this case, which has been affirmed by the Court of Appeals below, is erroneous.

2. Both the Commissioner and the petitioners filed *out-of-time* petitions for rehearing of the Second Circuit's affirmance of the Tax Court decision herein and are in agreement that the Second Circuit's affirmance of the Tax Court's decision is erroneous.

3. The Commissioner at the Court of Appeals did not controvert petitioner's detailed analysis on brief showing that:

a. A tax on Frank W. Coker's gross receipts from his trade or business is unconstitutional as violative of the 16th Amendment to the Constitution of the United States which grants Congress power to lay a tax on *incomes* — as distinguished from *receipts.*

b. Section 262 of the Internal Revenue Code is unconstitutionally vague and indefinite. Further, that Section 262 is a result largely of inertia rather than necessity. 4A Mertens, Law of Federal Income Taxation, sec. 25.17, fn. 66. Section 262 has a *con*junctive head, a *dis*junctive body, and no definitions whatever. We cannot read Section 262 as including anything. We cannot read Section 262 as excluding anything. Section 262 is undefined triple-talk.

c. There is no valid American commuting rule. That the commuting rule is entirely confined to the British Isles and may not be imported and imposed on Americans so long as the United States Constitution and its 16th Amendment remain as a barrier and safeguard against alien concepts of government and taxation. That the basic error lies in relying on British tax law and cases: *Revell* v. *Directors, etc.,* 3 Gr. Brit. Tax Cases 12 (1890); *Cook* v. *Knott,* 2 Gr. Brit. Tax Cases 246 (1887); *Lothian* v. *Macrae,* 22 Scot. Law Rptr. 219 (1884)—see *Gilberg* v. *Commissioner* (Appendix A *infra*, p. 13), 55 T.C. 611 (1971) at page 616.

d. Frank Coker's necessary implements in carrying on his trade or business were his 1964 Oldsmobile and his inseparable 200 pounds of carpenter tools. Frank would not go to work without the carpenter tools. Frank would not drive to work without the 1964 Oldsmobile containing the required carpenter tools. In viewing Frank Coker's total work patterns and requirements, it is an impossible concept that Frank would or could have driven to work in his 1964 Oldsmobile if the 1964 Oldsmobile with the inseparable carpenter tools was not moved from his driveway during the year 1966; such a concept is entirely irrational.

e. No part of Frank's driving expenses can be labeled personal, non-deductible, commuting expense under Section 262 of the Internal Revenue Code for reasons already given and for one additional reason. Even if we could pretend that Section 262 was not unconstitutionally vague and indefinite, there is a rule in tax law that Section 262 "personal" expenses should be limited to those which are not acquisitive in character from an income-producing point of view. *Primuth* v. *Commissioner,* 54 T.C. 374, 381. It is undisputed that all Frank's driving expenses were acquisitive in character from an income-producing point of view. The Tax Court stated the fact forcefully that Frank Coker "was *required* to transport approximately 200 pounds of tools to and from the job site daily in his 1964 Oldsmobile." (Appendix A, *infra,* p. 10)

4. Although the Second Circuit cited *Commissioner* v. *Flowers,* 326 U.S. 465, 469 (1946) for the proposition that commuting expenses have been "*considered*" non-deductible personal expenses (Appendix B, *infra,* p. 18), the Second Circuit nevertheless impliedly overruled or disagreed with the Supreme Court majority opinion in *Commissioner* v. *Flowers, supra,* by allowing as a deduction part of petitioner's business expenses away from the job site—thus

causing an apparent conflict with the prior decision of the Supreme Court in *Commissioner* v. *Flowers, supra.* Perhaps the *Flowers* decision should be reviewed, clarified or modified by this Court. Perhaps the Second Circuit is in error in citing the *Flowers* decision for the proposition that commuting expenses have been *"considered"* non-deductible personal expenses. Perhaps the *Flowers* decision was not unanimous. And perhaps the *Flowers* decision is incompatible with the United States Constitution. In a recent decision of this Supreme Court (*Fausner* v. *Commissioner of Internal Revenue,* Supreme Court, No. 72-1396. Decided June 25, 1973. *Petition For Rehearing filed* July 20, 1973), this Court pointedly declined to cite the *Flowers* case as having anything to do with commuting expenses although urged to do so by the Commissioner on page 2 of his *Fausner* Memorandum to this Court on Fausner's petition for certiorari. The *Fausner* case was decided without briefs or oral argument and this Court restricted its holding in the *Fausner* case to the peculiar Fausner facts and assertions that something "indivisible" could be "apportioned". Although the Fausner facts and assertions are diametrically different from this Coker case, we are encouraged that this Court recognizes the enormity of the problem facing the lower courts.

Courts of Appeals deal with substantially similar situations, attach different labels to them, discuss different sections of the Internal Revenue Code, discuss no sections of the Internal Revenue Code, make guesses as to which direction is up, and create different answers to tax questions which should all have the same answer. For instance:

In *Crowther* v. *Commissioner,* 269 F.2d 292 (C.A. 9), the Ninth Circuit allowed 100% of Crowther's automobile expenses of going to work.

In *Donnelly* v. *Commissioner,* 262 F.2d 411 (C.A. 2), *affirming* 28 T.C. 1278, the Second Circuit affirmed a Tax Court total disallowance of Donnelly's expense of going to work.

In *Tyne* v. *Commissioner*, 385 F.2d 40 (C.A. 7), *after remand*, 409 F.2d 485 (C.A. 7), *certiorari denied*, 396 U.S. 833, *on remand*, 29 T.C.M. 1398, *affirmed*, 468 F.2d 913 (C.A. 7), the Seventh Circuit affirmed a 50% allowance of Tyne's automobile expenses of going to work.

A viable solution to the question presented is possible and desirable in the administration of the Federal Tax Laws.

Pot-luck is now the rule in the lower Courts. No reasoned direction is being provided the truly massive numbers of people who travel to work in this nation.

Since the adoption of the 16th Amendment to the Constitution in 1913 and the enactment of the Income Tax Act of 1913, no definitive ruling has been made by the Supreme Court on the Constitutional questions here presented.

There is a mathematically accurate formula available to substitute for the diversity of lower Court estimates of business expense allowances which would substitute certainty for uncertainty and assist the Internal Revenue Service and the lower courts which decide questions of federal tax law.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

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October, 1973.

Appendix A

T. C. Memo. 1972-80

UNITED STATES TAX COURT

FRANK W. and REGINA COKER, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4163-70 SC. Filed March 30, 1972.

Thomas J. Carley, for the petitioners.
Fred L. Baker, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SACKS, *Commissioner*: Respondent determined a deficiency of $286.71 in petitioners' Federal income taxes for the year 1966. Since petitioners do not contest certain adjustments made in the statutory notice of deficiency only two issues are presented for our determination. The first issue involves the deductibility of all or any part of certain transportation expenses under section 162(a), Internal Revenue Code of 1954[1] incurred by petitioner Frank W. Coker while traveling between his personal residence and job site. The second issue is affirmatively pleaded by petitioners and involves the question of whether petitioners are entitled to a refund of all taxes paid for 1966 because respondent "elected to work without the statutory formula set out in section 63 and that statutory formula is not now available to respondent."

1 All statutory references herein are to the Internal Revenue Code of 1954, as amended, unless otherwise specified.

Appendix A

FINDINGS OF FACT

Some of the facts have been stipulated by the parties and are found accordingly.

Petitioners Frank W. Coker (hereinafter referred to as petitioner) and Regina Coker are husband and wife who resided at Eastport, L.I., New York, at the time they filed their petition in this case. Their 1966 joint Federal income tax return was filed with the district director of internal revenue, Brooklyn, New York.

During 1966, petitioner was employed as the carpenter shop steward by Ase Carpentry Contractors, Inc. (Ase) at its Stony Brook, New York job site. He worked at this site a total of 261 days during 1966. In connection with this employment, petitioner was required to transport approximately 200 pounds of tools to and from the job site daily in his 1964 Oldsmobile which he used for this purpose. The distance between petitioner's home and job site was 31 miles and during the year in issue petitioner traveled a total of 16,182 miles in making this trip each work day.

Petitioner's duties as carpenter shop steward during 1966 included blowing the whistle to start and stop work, deciding when weather was unfit to work in, checking carpenters' union cards, keeping time records, procuring union cards where necessary from the district council office, keeping records of each carpenter's time for his welfare, pension and vacation benefits, checking the union's time records against the contractor's records, taking injured carpenters to the hospital, insuring that contractors observed the terms of the union contract, and doing carpentry work as time permitted. In the course of performing these duties petitioner contacted at least once and sometimes two or three times each day more than 80 carpenters

employed by Ase and other contractors at this job site. These men were spread over two large tracts, eight to ten miles apart, where between 500 and 600 single family dwellings were constructed in 1966. To reach these men petitioner had to travel over from ten to fifteen miles of roads which were for the most part unpaved. During the year in issue petitioner traveled at least sixty miles per day on the job site and its vicinity in his automobile carrying out his duties as carpenter shop steward. No reimbursement for these expenses was made to petitioner by his employer. A total of 15,660 miles was driven by petitioner in 1966 in the course of his work at the Stony Brook job site.

Despite the provision of storage facilities by Ase for carpenters to store their tools and the presence of armed guards during non-working hours to protect these facilities, none of the carpenters employed at Stony Brook used these storage areas because of the problems of theft and vandalism. Ase did use these facilities and some of its equipment was stolen or vandalized while stored in them.

Petitioner used his automobile to transport and store his tools during the year in issue because it was the most feasible and satisfactory method for making them available when and where necessary in accordance with the requirements of his employment. Petitioner also used his automobile to travel between his personal residence and job site because it was the only feasible and satisfactory mode of transportation available for this purpose. Alternative transportation would have been more costly and would have required travel on at least one train and transfers to two separate buses. Therefore, petitioner would have driven to work absent the necessity of transporting his tools.

Appendix A

OPINION

Petitioner contends that the expenses he incurred in driving between his personal residence and job site at Stony Brook, L.I., New York and the travel expenses he incurred in the performance of his duties as carpenter shop steward at the job site both constitute deductible business expenses under section 162(a). Respondent argues that petitioner's expenses of driving between his personal residence and job site are personal, non-deductible, commuting expenses under section 262.[2] Respondent further asserts that the deduction for travel expenses incurred by petitioner at his job site should not exceed $1,339.20 which amount respondent determined to be properly deductible in the statutory notice of deficiency mailed to petitioner in this case.

In focusing upon the issues in this case respondent urges that the factual situation before us does not fall within the limited exception to the general rule regarding the allocation of business and commuting expenses set down in *Sullivan* v. *Commissioner,* 368 F.2d 1007 (C.A. 2, 1966), reversing and remanding 45 T.C. 217 (1965), Memorandum Opinion of this Court on remand, affirmed per curiam in an unpublished order (C.A. 2, 1969, 24 A.F.T.R. 2d 69-5053, 69-2 U.S.T.C. ¶9448), certiorari denied 396 U.S. 827 (1969). Respondent argues that (a) petitioner would have driven his automobile to work absent the necessity of transporting his tools; (b) adequate storage facilities were provided for petitioner's tools at the job site at no cost to him; (c) petitioner's activities as shop steward left him virtually no time to perform carpentry work and thus made the transportation of his carpentry tools un-

2 See also sections 1.162-2(e) and 1.262-1(b)(5), Income Tax Regs., which provide that the cost of commuting to and from work is not deductible.

necessary; and (d) the use of petitioner's automobile for business purposes once at the job site does not transform petitioner's personal expense of commuting into a business expense.

Although our findings of fact would dictate that we deny petitioner any deduction whatsoever because he would have used his automobile to travel between his residence and job site regardless of the necessity of transporting his tools or using his automobile in connection with his duties once at the job site, *Robert A. Hitt,* 55 T.C. 628 (1971) and *Harold Gilberg,* 55 T.C. 611 (1971), since an appeal from the decision in this case lies with the Court of Appeals for the Second Judicial Circuit we must follow the rule of law applicable to this case in that Circuit. *Jack E. Golsen,* 54 T.C. 742 (1970), affirmed on another issue 445 F.2d 985 (C.A. 10, 1971). For that reason, and because we have found that petitioner was required to perform carpentry work for Ase, as time permitted, thus necessitating the presence of his carpentry tools at all times as well as the fact that storage facilities for petitioner's tools at the job site were inadequate, we are constrained to hold that some portion of petitioner's expenses in driving between his residence and job site are properly deductible. *Sullivan* v. *Commissioner, supra; Arnold T. Anderson,* 55 T.C. 756 (1971); and *Donald W. Fausner,* 55 T.C. 620 (1971).

Petitioner demands that we go one step further. He argues that since his automobile was used and was actually required in carrying out his duties as carpenter shop steward, it is just as much a tool of his trade as his carpentry tools and the cost of transporting it to and from the job site should be equally deductible. Assuming, without

deciding, that this position is correct[3] we are still required under the circumstances of this case to allocate the expenses incurred by petitioner between the cost of his own transportation and that of his tools. *Sullivan* v. *Commissioner, supra.*

Having concluded that petitioner is entitled to a partial deduction of his expenses incurred in traveling to work, we must now determine the precise amount of his deduction. As noted earlier, petitioner would have driven his automobile to work under any circumstances. He refused to present any evidence to the contrary. Petitioner also failed to offer any evidence with respect to alternative transportation or the cost thereof and strenuously objected to the introduction into evidence of any testimony or documents bearing on this subject by respondent. Since such alternative transportation was not available to petitioner as a practical alternative, however, it is our conclusion that it is not a pertinent yardstick in this case for determining petitioner's deductible costs in traveling to work. See *Anderson, supra,* limiting the application of such a formula to appropriate circumstances. Petitioner has failed to offer any evidence on the cost or availability of adequate storage facilities for his automobile at his job site during non-working hours. On this point he chose to rely solely on the fact that the

3 Thus far the Courts of Appeals that have considered this question have been unanimous in rejecting the notion that the cost of transporting one's personal automobile to the place where one works, even though that automobile is used in the course of that trade or business, is a deductible expense under section 162. *Steinhort* v. *Commissioner,* 335 F.2d 496 (C.A. 5, 1964); *Heuer* v. *Commissioner,* 283 F.2d 865 (C.A. 5, 1960), affirming per curiam 32 T.C. 947 (1959); and *Smith* v. *Warren,* 388 F.2d 671 (C.A. 9, 1968). See also *United States* v. *Tauferner,* 407 F.2d 243, 246-247 (C.A. 10, 1969); *Sanders* v. *Commissioner,* 439 F.2d 296 (C.A. 9, 1971); *Clarence J. Sapp,* 36 T.C. 852 (1961), affirmed per curiam 309 F.2d 143 (C.A. 5, 1962) and *James M. O'Hare,* 54 T.C. 874 (1970).

tool sheds provided by Ase for tool storage were inadequate to house anything as large as an automobile. No further testimony regarding the cost or nonexistence of private storage facilities nearby was offered by petitioner. With these factors in mind as well as the fact that petitioner would not have utilized any available storage facility because he needed his automobile to transport himself to work daily, we must determine the amount of his travel expense that is properly deductible. Without purporting to set forth any standard for allocating the total cost between the personal commuting element and that element attributable to carrying his tools, *Fausner, supra,* and bearing heavily against petitioner because the inexactitude is of his making, *Cohan* v. *Commissioner,* 39 F.2d 540 (C.A. 2, 1930), we find that 33 1/3 percent of the costs of driving from petitioner's personal residence to his job site in 1966 is properly deductible. We also hold, in accordance with our findings of fact set out above, that petitioner is entitled to deduct the costs of traveling 15,660 miles in the course of his work at the Stony Brook job site, reduced by the amount of $1,339.20 previously allowed by respondent in this case.

Finally we hold that petitioner's contention that respondent "elected to work without the statutory formula set out in section 63 and that statutory formula is not now available to respondent" is totally without merit. Petitioner cites no statutory or judicial authority in support of this position and in fact, none exists. Petitioner would require that in every case where respondent challenges the propriety of a deduction, should the taxpayer be sustained, that taxpayer's tax liability for the year in issue would be extinguished. Such a rule would be patently absurd.

Reviewed and adopted as the Report of the Small Tax Case Division.

Decision will be entered under Rule 50.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 634/825—September Term, 1972.

(Argued April 16, 1973 Decided May 14, 1973.)

Docket No. 72-2309/73-1011

FRANK W. COKER and REGINA COKER,

Petitioners-Appellants and Cross-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee and Cross-Appellant.

On Appeals from the decision of the United States Tax Court.

Affirmed.

B e f o r e:

CLARK, *Associate Justice,**
WATERMAN and FEINBERG, *Circuit Judges.*

THOMAS J. CARLEY, 159 Princeton Road, Rockville Centre, New York, *for Petitioners-Appellants and Cross-Appellees.*

---

* Associate Justice of the United States Supreme Court (Retired), sitting by designation.

Appendix B

SCOTT P. CRAMPTON, Assistant Attorney General Meyer Rothwacks, Thomas L. Stapleton, David English Carmack, Attorneys, Tax Division, Department of Justice, Washington, D.C., *for Respondent-Appellee and Cross-Appellant.*

PER CURIAM:

This case involves a claimed deficiency in Mr. and Mrs. Frank Coker's joint federal income tax for the calendar year 1966 occasioned by their deduction of Mr. Coker's commuting expenses to and from his job site. Appellant Coker (husband) was a carpenter shop steward who performed carpentry work on the job site as time permitted. His duties necessitated the ready availability of his carpenter tools, and he therefore always carried an assortment of tools weighing some 200 lbs. with him in the 1964 Oldsmobile he used for commuting. In addition to the commuting to and from work, appellant also travelled some sixty miles a day in performing his duties on the job sites to which he was assigned; this expense was allowed as a deduction and is not involved here.

The Commission disallowed in its entirety appellant's claimed deduction for the expense of commuting to and from work. The Tax Court, considering itself bound by *Sullivan* v. *Commissioner*, 368 F.2d 1007 (2 Cir. 1966), allowed appellant to deduct what it considered a reasonable percentage of this commuting expense allocable to the transportation of his tools. Both the Cokers and the Commissioner appealed, the former insisting that all Mr. Coker's commuting expenses should have been allowed as deductions, while the Commissioner urges this Court to overrule *Sullivan, supra,* and deny the Cokers any deduction. We reject both arguments and therefore affirm.

Appendix B

Since the enactment of the Income Tax Act of 1913, commuting expenses have been considered non-deductible personal expenses. *Commissioner* v. *Flowers*, 326 U.S. 465, 469 (1946). In fact this rule has clearly been accepted by Congress. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A19 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4156); S. Rep. No. 1622, 83d Cong., 2d Sess. p. 169 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4803-4804). Coker seeks to escape this Congressional rule by claiming that his expenses were necessarily incurred in his effort to earn a living. But the same can be said of every taxpayer's expense in going to and from work. Furthermore, expenditures for food, clothing, and shelter are also necessary to enable one to earn a living. The fact is that Congress has directed that such expenses not be deductible. Appellant's argument that allowance of the deduction he claims is compelled by the Sixteenth Amendment does not merit discussion.

Nor are we persuaded by the Commissioner's argument that the primary purpose test should be applied. Taxpayer is entitled to some allowance for transporting the 200 lb. of tools under the peculiar circumstances here. *Sullivan* v. *Commissioner, supra. Sullivan* has been followed in this Circuit for some seven years. Any change in the rule should come from the Congress or the Supreme Court.

Affirmed.

Appendix C

SUPREME COURT OF THE UNITED STATES

No. A-154

FRANK W. COKER and REGINA COKER,
Petitioners,

— against —

COMMISSIONER OF INTERNAL REVENUE
Respondent.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 11, 1973.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 31st
day of July, 1973.